Supreme Court, U.S.
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No. 02-1017

IN THE
Supreme Court of the United States

TRI-COUNTY CONCERNED CITIZENS ASSOCIATION, PATTY BRANN, KATHY BRILL, WILLIAM CRANSTON, HOLLY HARTSHORNE, BARBARA MESSNER,

Petitioners,

v.

RAYMOND CARR, MORGANTOWN PROPERTIES, INC., WILLIAM BETZ, JUDITH BETZ, ROBERT G. WILLIAMS, CAROLYN WILLIAMS, CHERYL CONKEL AND NEW MORGAN BOROUGH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS NEW MORGAN BOROUGH, WILLIAM BETZ, JUDITH BETZ, ROBERT G. WILLIAMS, CAROLYN WILLIAMS AND CHERYL CONKEL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Fourteenth Amendment guarantees individuals who are neighbors but not residents of a municipality a constitutionally-protected property interest to be free from any "nuisance" and/or adverse consequences resulting from zoning decisions made by that municipality with regard to land located entirely within that municipality's borders.

II. Whether the Third Circuit properly held that Petitioners failed to plead a cognizable RICO violation in circumstances where the harm alleged by Petitioners was, at best, remotely related to the alleged predicate act.

III. Whether the Court of Appeals' decision to affirm the District Court's denial of Petitioners' request to file a Fourth Amended Complaint presents an issue worthy of this Court's review.

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STATEMENT OF THE CASE

In the early 1990's, New Morgan Borough, a fully-functioning municipality located in Southeastern Pennsylvania enacted a zoning ordinance which established, among other things, a solid waste district within the Borough where sanitary landfills would be permitted. Thereafter, in June of 1992, the Pennsylvania Department of Environmental Resources issued a permit to a waste management company authorizing the construction and operation of a landfill on property within that district.

On or about September 10, 1992, the Borough approved applications for that waste management company's landfill because it found that the uses were permitted by the ordinance. Thereafter, in or about November of 1992, Morgantown Properties sold to the waste management company approximately 425 acres for the purposes of constructing the landfill. The landfill began operating in January, 1994.

On August 14, 1998, Plaintiffs filed claims against the Borough, its officials and Raymond Carr and Morgantown Properties for what are essentially (although clothed in constitutional terms) claims for nuisance stemming from uses which had been approved by the Borough as well as uses which had been proposed but had not received final approval. (19a). Plaintiffs did not join the waste management company (the entity that constructed and operated the landfill) or Pennsylvania's Department of Environmental Protection, formerly the Department of Environmental Resources, (the entity that issued the permit for the landfill) as Defendants in this action.

By Motions filed October 13, 1998, each of the named Defendants moved to dismiss the claims asserted against them in Plaintiffs' Complaint. By Order entered November 20, 1998, the district court granted the various Defendants' Motions to Dismiss. An appeal to the Third Circuit followed and on December 7, 1999, in an unreported opinion, the Third Circuit reversed the decision of the District Court on standing grounds and remanded the case to the District Court for further proceedings.

After Plaintiffs filed an amended complaint, and Defendants again moved to dismiss, the District Court on September 19, 2001, dismissed Plaintiffs' Amended Complaint.

On appeal, the Third Circuit affirmed the decision of the district court largely on the grounds articulated by the District Court; namely that: (i) Petitioners failed to identify a protected property interest sufficient to give rise to substantive due process protection under the United States Constitution; (ii) Petitioners failed to identify a violation of procedural due process, both because they failed to identify a protected property interest and because they failed to demonstrate that the procedures available to them to challenge the alleged deprivation do not satisfy their due process concerns; and (iii) Petitioners failed to establish the requisite causal connection sufficient to satisfy their burden under RICO. The Third Circuit also denied Plaintiffs leave to further amend their complaint.

REASONS FOR DENYING THE PETITION

The petition should be denied for three reasons.[1] First, the Third Circuit's holding that there is no recognized constitutionally-protected property interest to be free from the effects of a neighboring municipality's zoning decisions does not conflict with any decision of this Court or that of any other court in any other circuit. Second, the Third Circuit's decision – which essentially found that in this case the harm alleged was too tangentially related to the alleged predicate acts to establish the requisite causal connection between the injury and violation of Section 1962[2] as required -- is completely consistent with precedent from this Court and decisions of other circuit courts on this issue. Finally, given the history of this case, the Third Circuit's affirmance of the district court's denial of leave to further amend was completely consistent with controlling precedent and the only effective way to finally put to an end the numerous unsuccessful attempts at re-pleading undertaken by Petitioners.

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[1] New Morgan Borough and its officials hereby incorporate by reference the arguments set forth in the response filed by Morgantown Properties and Raymond Carr in this case.

[2] 18 U.S.C. §1962.

A. Certiorari is Unwarranted Because No Other Court Has Recognized A Constitutionally Protected Property Right To Be Free From the Effects of Zoning Decisions of Neighboring Municipalities and Thus There is No Conflict Between this Case and Any Other Decision

Petitioners argue that the Third Circuit's opinion improperly contravenes controlling precedent by this Court, specifically *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978), *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 677 (1987) and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1475 (U.S. 2002), by holding that the Fourteenth Amendment does not protect property rights of individual property owners whose property is "taken" from them as a result of the actions of an "abutting" government. (Pet. 11).

However, despite Petitioners attempt to cast it as such, this is not a *de jure* or *de facto* Fifth Amendment "takings" case nor a case in which property owned by Petitioners is the subject of regulation by a municipality. (Indeed, while Petitioners did attempt to assert a takings claim in their initial pleadings, any such claim was abandoned by virtue of Petitioners' failure to include it as a count in their Third Amended Complaint.) Rather, Petitioners' claim is that New Morgan Borough has violated their due process rights under the Fourteenth Amendment and has violated the RICO statute by *allowing* for the creation of certain uses within that municipality's borders, which uses Petitioners claim has had

and will continue to have an adverse effect on Petitioners' property and property values.

As such, this case -- limited as it is to these unique facts -- is entirely distinguishable from *Penn Central*, *Tahoe* and *Nollan*, each of which involved claims of taking under the Fifth Amendment. In *Penn Central*, this Court rejected the plaintiffs' claims that application of New York City's Landmarks Preservation Law – which directly applied to claimant's property -- resulted in a "taking" of their property without just compensation in violation of the Fifth and Fourteenth Amendments. *Nollan*, while recognizing that a takings claim may result from overly-restrictive regulation by a municipality, also involved Fifth Amendment concepts as a result of regulations imposed by a municipality on the plaintiffs' land. *Tahoe*, too, involved regulations imposed on the plaintiffs' property which were alleged to have so severely restricted use of that land that they rose to the level of a takings claim under the Fifth Amendment.[3]

In sharp contrast to those cases, this case involves claims brought exclusively under the due process clause of the Constitution and RICO.

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[3] The remaining cases cited by Petitioners for this proposition – *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) are likewise distinguishable because those cases also involved claims of taking brought under the Fifth Amendment.

The Third Circuit correctly adopted the District Court's holding that these claims required Petitioners to articulate a constitutionally-protected property interest, which this Court has recognized is not created by the Constitution but rather is "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *See Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972), The Third Circuit correctly concluded that the Fourteenth Amendment has not been held to apply to the interest alleged here – *i.e.*, interest in freedom from the effects of land use decisions of neighboring municipalities -- and thus, affirmed the district court's dismissal on these grounds.

The Third Circuit also correctly recognized that, even assuming Plaintiffs could identify a protected property interest, they had not and, indeed, could not, allege that the procedures available to them under Pennsylvania state law for challenging land use decisions of local municipalities were defective. Thus, the Third Circuit correctly dismissed Plaintiffs' procedural due process claims for this reason as well.

In sum, the Third Circuit properly recognized that the well-established requirements of a due process claim were not met by Plaintiffs' allegations. There is no conflict between this case and any other decided by this Court, and thus, this Court should deny Petitioners' petition in its entirety.

B. Certiorari Is Unwarranted Because The Third Circuit Correctly Applied Controlling Precedent When It Concluded That The Harm Alleged Was Too Tangentially Related to The Alleged Predicate Acts to Constitute a Viable RICO Violation.

Petitioners also assert that certiorari should be granted in this case because the Third Circuit erroneously held that a plaintiff's injury must be "directly caused" by the alleged RICO violation in order for a cognizable RICO claim to be stated. Petitioners claim that this decision is in direct conflict with the decisions of other circuit courts, in particular, the Second Circuit, Fourth, Fifth and Seventh Circuits on this precise issue. (Pet. 18).

Petitioners misstate the scope of the Third Circuit's holding. Properly stated, the Third Circuit's conclusion regarding the complaint in this matter is entirely consistent with the decisions of these other circuits.

The Third Circuit's decision in this case was premised on its conclusion that Petitioners had failed to allege that their injuries were *proximately caused* by the alleged racketeering activities undertaken by the Borough, its officials or the other Defendants, not, as Petitioners suggest, because they failed to allege that their injuries were "directly" caused by these alleged RICO predicate acts. That the standard applied by the Third Circuit is the appropriate one is clear from the precedent decided by this Court. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992); *Sedima S.P.R.L. v. Imred Co.*, 473 U.S. 479 (1985) ("[a] defendant who violates Section 1962 is not liable to everyone he might

have injured by other conduct, nor is the defendant liable to those who have not been injured"), as well as case law from other circuits. *See, e.g., First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 767 (2d Cir. 1994) ("we read section 1964(c) as requiring a RICO plaintiff to make two related but analytically distinct threshold showings relevant in this appeal: (1) that the plaintiff suffered an injury to business or property; and (2) that the plaintiff's injury was proximately caused by the defendant's violation of 18 U.S.C. § 1962.")

Indeed, as the District Court noted, proximate causation itself may be broken down into three factors: (1) the directness of the injury -- "the more indirect the injury, 'the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to [defendant's wrongdoing], as distinct from other, independent, factors;'" (2) the difficulty of apportioning damages among potential plaintiffs -- "allowing recovery by indirectly injured parties would require complicated rules for apportioning damages;" and, (3) the possibility of other plaintiffs vindicating the goals of RICO -- "direct victims could generally be counted on to vindicate the policies underlying" RICO in a better manner than indirect victims. Appendix B at 15-16.

Application of these factors in this case leads to the inevitable conclusion that the injuries about which Plaintiffs complain are remote and indirect from any alleged predicate act/violation of RICO especially where the harm alleged (damage to Plaintiffs' property in the form of "noxious odors, loud and destructive noises, trash hanging from trees on local roads, damaged streets, and broken windshields) is

caused, if at all, by the day-to-day *operation* of the landfill, which is the result of the activity (or inactivity) of either the Pennsylvania Department of Environmental Protection, the entity who permitted and now regulates this landfill, or Browning-Ferris Industries, the entity which owns the landfill and manages its day-to-day operations.

For all of these reasons, it is clear that the Third Circuit applied the proper analysis when it affirmed the dismissal of Petitioners' claims, *Holmes*, 503 U.S. at 268-69, and that Petitioners' claims in this case are founded on sheer speculation rather than the appropriate proximate causation analysis required under RICO. *See Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080, 145 L. Ed. 2d 673, 120 S. Ct. 799 (2000) (affirming dismissal of RICO claims on the grounds that, among other things, alleged injuries were too remote, finding it the "sheerest sort of speculation to determine how these damages might have been lessened had the Funds adopted [special] measures").

C. Petitioners Have Failed To Articulate A Cognizable Reason Why This Court Should Review The Third Circuit's Decision Affirming The Denial Of The Request For Further Leave To Amend.

Petitioners alternatively contend that this Court should grant certiorari to correct the Third Circuit's order which denied them further leave to amend their Complaint. Petitioners do not explain how this issue – clearly within the discretion of the district court and thus measured against an

abuse of discretion standard by the Third Circuit – rises to the level of a claim worthy of this Court's review.

Moreover, in their attempt to raise this as an issue, Petitioners fail to provide a fair or complete statement as to the context for the lower court's ruling. The facts of this case, however, demonstrate that the Third Circuit affirmed the denial of leave to amend in this case in order to put a stop to the abusive and dilatory tactics employed by Petitioners in this case. Without reciting the entire history of this case, suffice it to say that Petitioners ignored court orders directing them to file the specific complaints they stated they would file and Petitioners' were given at least three opportunities to state their claims but were unsuccessful in doing so. Any further attempt at amending would have been futile.

CONCLUSION

For all of the foregoing reasons, Appellees New Morgan Borough, William Betz, Judith Betz, Robert Williams, Carolyn Williams and Cheryl Conkel respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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